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No. 84-900

In The

Supreme Court of the United States

October Term, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Response of Maine Public Utilities Commission, Respondent, to the Petition for Certiorari

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Response of Maine Public Utilities Commission, Respondent, to the Petition for Certiorari

The Maine Public Utilities Commission Does Not Oppose The Petition For Certiorari Filed By New England Telephone & Telegraph Company

The Maine Public Utilities Commission does not oppose the Petition for Certiorari filed by New England Telephone & Telegraph Company. While we believe that the decision of the First Circuit is correct and should be sustained, we recognize that there is a conflict among the circuit courts and that the issues in the case are im-

portant and have been the subject of extensive litigation nationwide.

The issue presented in this petition is whether private parties may use 47 USC § 401(b) to enforce a ruling made by the FCC[1] preempting the states from determining depreciation rates to be used in setting intrastate telephone rates. This issue is presently before this Court in at least two other proceedings. In *Arkansas Public Service Commission et al. v. Southwestern Bell Telephone Company*, No. 84-483, the Arkansas Public Service Commission filed a petition for certiorari seeking review of a ruling by the Eighth Circuit that private parties may enforce the FCC's Order under 401(b). *Southwestern Bell Telephone Company v. Arkansas PSC*, 738 F.2d 901 (8th Cir. 1984). The Maine Public Utilities Commission signed an *amicus* brief with fourteen other states and the National Association of Regulatory Utility Commissioners in support of the Arkansas PSC's Petition for Certiorari, noting, among other things, that the First Circuit had cited the Eighth Circuit's decision and expressly declined to follow it.

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[1] Amendment of Part 31, Memorandum Opinion and Order, 92 FCC2d 864 (1983). This decision was sustained by the Fourth Circuit in *Virginia State Corporation Commission v. Federal Communication Commission*, 737 F.2d 358 (1984). The case is now before this Court as the subject of three separate petitions for certiorari and one appeal. The first *California Public Utilities Commission et al. v. Federal Communications Commission and United States of America*, No. 84-889, was signed by 15 other states or state utility commissions, the District of Columbia Public Utilities Commission, and the National Association of Utility Regulatory Commissioners. The Maine PUC filed an *amicus* brief in this proceeding. Separate petitions for certiorari were filed by Ohio and Florida. (Nos. 84-1054 and 84-1069 respectively). The Louisiana Public Service Commission filed a jurisdictional statement. No. 84-871

The Fourth Circuit and Fifth Circuit also have held that private parties may enforce the FCC's order under 401(b). *Chesapeake & Potomac Telephone Co. v. Maryland Public Service Commission*, 748 F.2d 879 (4th Cir. 1984); *South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984). The Louisiana Public Service Commission filed a Notice of Appeal in the Fifth Circuit. Its jurisdictional statement in this Court has been docketed as No. 84-870.

At least six other cases involving the same issue have been litigated in the district courts. The Vermont District Court held that state commissions are not "persons" against whom enforcement may be brought under Section 401(b). *New England Telephone v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1983), appeal pending, No. 84-7051 (2nd Cir. filed June 27, 1984); Other courts have found the FCC's Order enforceable under 401(b). *Northwestern Bell Tel. Co. v. Iowa State Commerce Commission*, No. 83-688-A (S.D. Iowa, Sept. 27, 1984); *Pacific Northwest Bell v. Washington Utilities & Washington Utilities & Transportation Commission*, 565 F.Supp. 17 (W.D. Wash. 1983), appeal pending, No. 83-3746 (9th Cir. filed April 19, 1983). *Mountain States Tel. and Tel. Co. v. Montana Dept. of Public Service Regulation*, 588 F. Supp. 5 (D. Montana, 1983), *Southwestern Bell Telephone Co. v. State Corporation Commission*, No. 83-4090, D.C. Kan. April 8, 1983); *Wisconsin Bell Inc. v. Public Service Commission of Wisconsin et al.*, No. 834-C-4, E.D. Wisc. November 13, 1984.

If the issue reaches this Court on the merits through any of the petitions for certiorari now pending, a determination that the appeal from the Fifth Circuit decision

is properly brought, or through proceedings in any of the other circuits, the Maine Public Utilities Commission would prefer that certiorari be granted in the First Circuit as well. The decision of the First Circuit could be overruled by an adverse decision in one of these other cases. If the issue does reach this Court, the Maine Public Utilities Commission would appreciate the opportunity to be heard on the merits.

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CONCLUSION

For the reasons stated above, the Maine PUC does not oppose the Petition for Certiorari filed by New England Telephone Company.

DATED: February 4, 1985

Respectfully submitted,

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